

March 20, 2019

Lauren F. Goldberg
lgoldberg@k-plaw.com

BY ELECTRONIC MAIL ONLY (70225-48976118@requests.muckrock.com)

Mr. Danforth Kelly
Muck Rock News
DEPT MR 70225
411A Highland Avenue
Somerville, MA 02114-2156

Re: Request Dated March 6, 2019 – Records Related to Appraisal of 751 Boston Post Road

Dear Mr. Kelly:

This office serves as Town Counsel to the Town of Weston, Massachusetts (“Town”). The Town received your March 6, 2019 request for records, e-mailed to Town Clerk and Records Access Officer Deborah Davenport. Specifically, you requested, “Copies of all e-mails (including attachments) or other written correspondence pertaining to the appraisal of 751 Boston Post Road for the Town of Weston’s option to purchase that property under M.G.L. ch.61a §14.” Please allow this letter to serve as the Town’s response to your request.

Please be advised that the Town’s duty to respond to records requests extends only to records that are in existence and in the custody of the Town, and the Town is under no obligation to create records in response to your request. Furthermore, the Town is not required to answer questions in response to a public records request. See “A Guide to the Massachusetts Public Records Law,” January, 2017, published by the Secretary of the Commonwealth, at page 3.

Responsive Records

The Town has reviewed your request, and based upon its initial review, anticipates that it has records responsive to your request. Responsive records subject to mandatory disclosure under the Public Records Law will be provided upon payment of any applicable fees (addressed below). Where permitted by law, however, such records or material contained therein may be withheld or redacted under any of the exemptions to the Public Records Law, other applicable provisions of law, and/or common law privileges, such as the attorney-client privilege. See, e.g., G.L. c. 4, §7(26); Suffolk Construction Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 449-450 (2007); 950 CMR 32.06(3). The Town will, of course, provide copies of responsive records, redacted as appropriate, following payment of the fee estimate.

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Fee Estimate

Following the Town's initial review, the Town anticipates producing the following categories/types of records in response to your Request: non-privileged, non-exempt, e-mails or portions thereof, concerning the appraisal of 751 Boston Post Road under the circumstances you describe. The initial search for responsive records by the Town's IT staff took ½ hour, and produced over 400 records, although it is anticipated that only about half that number are actually responsive to your request. Additionally, of those records that are most likely responsive, it appears that approximately 50 have attachments.

Each responsive record requires review to analyze whether it is subject to redaction or withholding under the attorney-client privilege or other applicable exemptions to the Public Records Law. For the reasons indicated in the "Summary of Bases for Anticipated Withholding or Redacting of Responsive Records", below, this segregation and/or redaction work can only be performed by the Town Manager or an attorney representing the Town to make reasoned determinations as to the status of ongoing pending matters and applicability of the attorney-client privilege, the Open Meeting Law as it operates through Exemption (a) of the Public Records Law, Exemption (d) to the Public Records Law concerning deliberative positions still being developed, including litigation matters, and Exemption (c) concerning personal or personnel matters, and the like.

Be advised that IT Staff, the Town Manager and this office's hourly rate exceeds \$25/hour, but has been reduced to the same for purposes of this estimate. It is estimated that it will take approximately 30 seconds per email, and 30 seconds per attachment, to conduct such analysis, segregation and where appropriate, redaction. This number is an average, as the time for such review will be lower in some instances and higher in others, particularly where redactions are necessary. Thus, to review the e-mails only, the fee estimate is derived as follows: 30 seconds x 400 = 3.3 hours and \$83.33. To review the attachments, the fee estimate is as follows: 30 seconds x 50 = approximately ½ hour or \$12.50. Additionally, the IT staff utilized ½ hour of time, or \$12.50. Therefore, the total fee estimate is **\$108.43** for employee search, segregation and redaction time. Upon receipt of payment in that amount made directly to the Town of Weston, the Town will continue the work necessary to respond fully to your request. Please note that a records custodian is not obligated to perform the work necessary to compile or provide responsive records until all fees are paid. See 950 CMR 32.06(2)(f); see also Determination of the Supervisor of Records, Dated August 7, 2017, SPR17/1005. Thus, upon receipt of payment of the fee estimate, the Town anticipates it will take up to 15 business days to fully respond to your request.

The Town anticipates providing the records in an electronic format; however, because redactions may be required, the Town will update its estimate if additional employee time is needed or significant printing is required (\$.05/page).

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Until such time as the estimated fee is paid and the Town completes its work in searching for, segregating, and redacting (where appropriate) responsive records, the Town cannot fully determine the extent to which documents will be withheld or redacted. Nonetheless, based upon its superior knowledge of the contents of responsive records generally, the Town anticipates redacting or withholding records, under any of the exemptions to the Public Records Law, as well as, as applicable, the attorney-client privilege and/or work product doctrine. See, e.g., G.L. c.4, §7(26); see Suffolk Construction Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 449-450 (2007) (application of attorney-client privilege to governmental entities); 950 CMR 32.06(3); DaRosa v. City of New Bedford, 471 Mass. 446 (2015), (application of work product doctrine to governmental entities). Although the Town identifies below the anticipated bases for withholding or redacting responsive records, it reserves the right to identify and assert any other applicable exemptions and/or common law privileges. In accordance with G.L. c.66, §10(b)(iv), nothing herein shall limit the Town's ability to redact or withhold information in accordance with state or federal law.

Summary of Bases for Withholding or Redacting of Responsive Records

Exemption (a):

Where the language of the exempting statute expressly states or necessarily implies that the public's right to inspect records is limited, records may be withheld or redacted pursuant to Exemption (a). Attorney General v. Collector of Lynn, 377 Mass. 151, 154 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-546 (1977). Certain responsive e-mails may contain information prepared for or used in executive session in accordance with the exemptions to the Open Meeting Law, G.L. c.30A, §21(a)(1)-(10). Pursuant to G.L. c.30A, §22(f) and (g), executive session materials may be withheld, "as long as publication may defeat the lawful purposes of the executive session." Therefore, to the extent any responsive records contain information, the publication of which would defeat the purposes of an executive session, such record or portion thereof will be withheld from disclosure.

Exemption (c):

The Town may also withhold or redact several categories of information pursuant to Exemption (c), G.L. c. 4, §7(26)(c), which permits a records custodian to withhold records that are:

Personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.

Exemption (c) contains two separate bases for non-disclosure. The first clause of Exemption (c) covers personnel and medical records and information. The Massachusetts Supreme Judicial Court ("SJC") has defined personnel records to include any records that would be helpful in making

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determinations regarding hiring and firing. Wakefield Teachers Association v. School Committee of Wakefield, 431 Mass. 792, 798 (2000). Specifically, the SJC stated:

While the precise contours of the legislative term “personnel [file] or information” may require case-by-case articulation, it includes, at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee. These constitute the core categories of personnel information that are “useful in making employment decisions regarding an employee.”

The SJC has characterized personnel records as “absolutely exempt from disclosure.” *Id.* at 799, 802; see also Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 438 (1983); Brogan v. School Committee of Westport, 401 Mass. 306, 308 (1987). It is noteworthy that the SJC’s application of the first clause of Exemption (c) as shielding personnel records and information from public disclosure protects “the government’s ability to function effectively as an employer.” Records reflecting Town personnel and staffing matters relate directly to the Town’s function as an employer and are precisely the type of “personnel” files or information absolutely exempt from disclosure under the first clause of Exemption (c). To the extent, therefore, that personnel information is contained in responsive records, it will be withheld from disclosure.

In addition, the first clause of Exemption (c) covers medical information about specifically named individuals. Therefore, should the responsive records contain any medical information about specifically identified individuals, it will be redacted.

Moreover, the second clause of Exemption (c) protects intimate details of a highly personal nature from public disclosure. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980). The second clause of Exemption (c) applies here, to both information about Town personnel and others. In considering whether privacy rights are implicated by the request for records, be aware that G.L. c.214, §1B prevents information from being disclosed that would constitute an unwarranted invasion of personal privacy. The case law interpreting this provision indicates that there is some information that is personal in nature that can be withheld to the extent that the public’s interest therein is outweighed by the privacy interests at stake. See, e.g., Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980) (holding that the second clause of exemption (c) protects “intimate details of a highly personal nature,” including marital status, legitimacy of children, paternity, medical condition, and government assistance). Thus, to the extent that responsive records contain intimate details highly personal in nature, such information will be redacted pursuant to the second clause of Exemption (c).

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Exemption (d):

Responsive records may also be withheld or redacted pursuant to Exemption (d), G.L. c. 4, §7(26)(d). Exemption (d) applies to records reflecting “policy positions being developed by the agency,” which may be withheld from public disclosure. This exemption is intended to avoid release of materials which could taint the deliberative process if prematurely disclosed. The scope of application of the exemption is on recommendations concerning legal and policy matters found within an ongoing deliberative process. Babets v. Secretary of the Executive Office of Human Services, 403 Mass. 230, 237 n.8 (1988). To the extent that matters at issue in responsive records involve ongoing policy matters for which no final determination or resolution has occurred, or where discussions involve the ongoing policy determinations made by the Town on a regular and continuing basis, including matters that are the subject of litigation, such information will be redacted from responsive records pursuant to Exemption (d).

Attorney-Client Privilege/Work Product Doctrine

Where the Town or its agents receives information from legal counsel, in confidence, such discussions and any documents reflecting advice from its counsel, would be protected from disclosure under the attorney-client privilege. The attorney-client privilege applies “(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.” Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 303 (2009) (citing Suffolk Constr. Co., supra at 448 (privilege protects “all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice”)) “The purpose of the privilege ‘is to enable clients to make full disclosure to legal counsel of all relevant facts ... so that counsel may render fully informed legal advice,’” with the goal of “promot[ing] broader public interests in the observance of law and administration of justice.” Suffolk Constr. Co., supra at 448, 449 (citations and quotations omitted). Moreover, certain documentation may also be covered by the work product doctrine, which protects an attorney’s written materials containing the “‘mental impressions, conclusions, opinions, or legal theories’ of its authors.” See Commissioner of Revenue, supra at 312 and 319 (citations and quotations omitted).



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Finally, be informed that you have the right to appeal this response to the Supervisor of Records under G.L. c.66, §10A(a) and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under G.L. c.66, §10A(c).

Very truly yours,

A handwritten signature in blue ink, appearing to read "Lauren F. Goldberg", with a long horizontal flourish extending to the right.

Lauren F. Goldberg

LFG/

cc: Town Clerk/Records Access Officer (by e-mail only: davenport.d@westonmass.org)
Town Manager (by e-mail only; Gaumond.l@westonmass.org)

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